

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ALASKA
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4 MONIQUE R. SNEAD, Individually,
5 and as Personal Representative of the
6 Estate of John H. Snead; *et al.*,

7 Plaintiffs,

8 vs.

9 GUADALUPE C. WRIGHT; *et al.*,

10 Defendants.
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Case No. 3:19-cv-00092-JWS
3:19-cv-00209-JWS
CONSOLIDATED

ORDER

13 **I. MOTION PRESENTED**
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15 At docket 134, Defendant Merrill Lynch, Pierce, Fenner & Smith
16 Incorporated (“Merrill Lynch”) filed a motion to exclude the proposed expert
17 testimony of Chris McConnell, the financial services industry expert for Plaintiffs
18 Monique R. Snead and John G. Snead (“Plaintiffs”). Plaintiffs filed an opposition at
19 docket 139. Merrill Lynch filed a reply at docket 142. Oral argument would not be of
20 assistance to the court.
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22 **II. BACKGROUND**
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24 This federal action involves a dispute involving certain Merrill Lynch
25 accounts held by John H. Snead, the father of Plaintiffs, who died in August 2017.
26 Plaintiffs allege that Defendant Guadalupe Wright (“Wright”), who had been in a long-
27 term relationship with John H. Snead up through his death and an employee of Merrill
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1 Lynch, unlawfully transferred funds from John H. Snead’s trust accounts and
2 fraudulently made herself the beneficiary of his annuity. In addition to the claims
3 asserted against Defendant Wright, Plaintiffs also allege that Merrill Lynch facilitated
4 these transactions for the benefit of Wright and to the detriment of the decedent and
5 Plaintiffs. They bring multiple causes of action against Merrill Lynch, including
6 breach of fiduciary duty, negligence, and fraudulent nondisclosure. In furtherance of
7 these claim, Plaintiffs retained Chris McConnell (“McConnell”) as an expert in the
8 financial services industry. Merrill Lynch moves to exclude all testimony from
9 McConnell, arguing that his expert report improperly presents opinions on legal issues
10 and that his opinions are unreliable because they are “replete with speculation,
11 mischaracterizations of evidence, factual errors and unsupported assertions.”¹
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15 III. LEGAL STANDARDS

16 Federal Rule of Evidence 702 permits a witness qualified by
17 “knowledge, skill, experience, training, or education” to offer expert testimony where:
18 (1) the testimony will help the trier of fact understand the evidence or determine a fact
19 in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the
20 product of reliable principles and methods; and (4) the expert has reliably applied the
21 principles and methods to the facts of the case.² This rule helps the court perform its
22 mandatory gatekeeping function to “assure that the expert testimony ‘both rests on a
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28 ¹ [Docket 134 at 2.](#)

² [Fed. R. Evid. 702.](#)

1 reliable foundation and is relevant to the task at hand.”³ “[T]estimony is relevant if
2 the knowledge underlying it has a valid connection to the pertinent inquiry.”⁴
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4 Testimony is reliable if it is rooted in the “knowledge and experience of the relevant
5 discipline.”⁵ The court’s role in analyzing reliability “is to analyze not what the
6 experts say, but what basis they have for saying it.”⁶ That is, reliability is not to be
7 conflated with credibility. “Shaky but admissible evidence is to be attacked by cross
8 examination, contrary evidence, and attention to the burden of proof, not exclusion.”⁷
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10 The court must act as gatekeeper for both scientific and non-scientific
11 expert testimony, although it has flexibility in structuring how it determines whether
12 expert testimony is reliable and relevant.⁸ For non-scientific testimony, such as
13 testimony about industry practices and standards, reliability often cannot be measured
14 by examining the methodology, theories, or technical framework supporting the
15 opinion. Rather, reliability is more dependent on the knowledge and experience of the
16 expert.⁹ Exclusion of expert testimony should be “the exception rather than the rule.”¹⁰
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24 ³ *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow*
25 *Pharm., Inc.*, 509 U.S. 579, 597 (1993)).

26 ⁴ *Id.* at 565 (quoting *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)).

27 ⁵ *Id.*

28 ⁶ *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (quoting *Daubert*
v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995)).

⁷ *Primiano*, 598 F.3d at 564.

⁸ *United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020).

⁹ *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004).

¹⁰ Fed. R. Evid. 702 advisory committee’s note to 2000 amendment.

IV. DISCUSSION

McConnell's qualifications to testify about matters specific to financial services are not in question here. He possesses an undergraduate degree in economics, as well as a master's degree in business administration. He has a background as a Certified Public Accountant. He worked in the financial planning and advising sector for twenty years before becoming an Accredited Investment Fiduciary Analyst (AIFA) in 2004. He has experience in consulting on matters related to the securities, banking, and financial services industry, including regulatory and internal compliance, custom and practices, supervision, and fiduciary duties. He claims experience in pre-claim, litigation, and arbitration support in cases involving standard of care, custom and practice, and liability.

Despite these unchallenged qualifications, Merrill Lynch argues his testimony should be excluded in full because his expert report offers improper legal opinions about the annuity and trust accounts at issue, including an opinion about how Merrill Lynch breached a fiduciary duty—one of the ultimate legal issues in the case. It also asserts that his opinions, legal or otherwise, are wholly conclusory, without supporting explanation, and based upon speculation and mischaracterizations of the evidence to such an extent that the court should deem any testimony from him an “unreliable nonsense opinion” that should be withheld from the jury.¹¹

¹¹ See *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (“Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.”).

1 **A. Legal Opinions**

2 McConnell’s expert report is centered around the applicable duties owed
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4 by Merrill Lynch to John H. Snead and the beneficiaries of the applicable trusts, and
5 whether any of Merrill Lynch’s actions at issue in this case “violated any duty,
6 applicable laws, internal policies, or customary practices.”¹² He offers an opinion in his
7 report that Merrill Lynch owed John H. Snead and Plaintiffs a fiduciary duty and that
8 it breached that duty. He also concludes Merrill Lynch violated various SEC and
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10 FINRA rules and regulations.

11 McConnell’s inclusion of these legal issues in his report does not require
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13 that he be outright excluded from testifying at trial.¹³ Testimony that touches upon or
14 embraces an ultimate issue is not automatically objectionable. Indeed, the Ninth
15 Circuit specifically has held that testimony regarding whether “[d]efendants failed to
16 comport with industry standards” may be properly admitted at trial.¹⁴ The testimony
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18 only becomes excludable when it includes an opinion on what legal conclusion should
19 be reached by the trier of fact.¹⁵

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21 After due consideration of McConnell’s report, the court declines to
22 exclude his proposed testimony wholesale. McConnell must refrain from offering the
23 opinion included in his report that Merrill Lynch breached its fiduciary duties, because
24 that is a legal conclusion that encroaches on the job of the fact finder. He may,
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26 ¹² [Docket 135-1 at 2–3.](#)

27 ¹³ [Mukhtar v. Cal. State Univ., Hayward](#), 299 F.3d 1053, 1065 n.10 (9th Cir. 2002) (“It is
28 well-established . . . that expert testimony concerning an ultimate issue is not per se improper.”).

¹⁴ [Hangarter](#), 373 F.3d at 1016.

¹⁵ *Id.*

1 however, offer testimony at trial to the extent his testimony can be narrowed to focus
2 on explaining the applicable industry standards and best practices garnered from his
3 experience in the industry and how Merrill Lynch's actions and decisions failed to
4 comport with these standards and practices. He may offer opinions that touch on
5 various financial regulations, as long as he can articulate his understanding of what
6 each regulation requires based on his experience and why actions taken by Merrill
7 Lynch fall short of these requirements and expectations.
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10 To the extent Merrill Lynch requests that this court parse through
11 McConnell's report and specifically identify which statements would and would not
12 be admissible, the court declines to do so. The "report is not evidence and, because
13 the objectionable character of some of his statements may simply be due to injudicious
14 phrasing, a pre-trial ruling on the admissibility of his testimony is premature."¹⁶
15 Plaintiffs' counsel, however, should caution McConnell that he cannot offer opinions
16 about the correct legal conclusion, nor can he opine as a legal expert. Additionally,
17 McConnell cannot testify, as his report suggests he might, about any potential money
18 laundering; any such testimony is beyond the scope of his expertise. His testimony
19 must be related to standards of care in the financial industry—based on custom, best
20 practices, company policies, or applicable regulations—as he understands them to
21 operate based on his years of experience. Any disagreement with his understanding of
22 those standards is the proper subject of cross-examination rather than exclusion.
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28 ¹⁶ *Madrigal v. Allstate Indem. Co.*, CV-14-4242-SS, 2015 WL 12746232, at *5 (C.D. Cal. Oct. 29, 2015).

1 **B. Reliability**

2 Merrill Lynch also asserts that McConnell’s expert opinion testimony
3 should be excluded because it constitutes ipse dixit testimony—opinions offered
4 without supporting explanation and based upon speculation and mischaracterizations
5 of the evidence. In support, Merrill Lynch points to a dozen examples of statements
6 McConnell made in his report or deposition that it asserts are based on speculation or
7 erroneous facts, or are otherwise wholly conclusory opinions made without reference
8 to a specific policy, best practice, or regulation. After due consideration of Merrill
9 Lynch’s argument and McConnell’s report and deposition, the court cannot deem his
10 testimony wholly unreliable. As noted above, when testimony is not scientific or
11 technical, reliability rests less on an examination of the expert’s methodology or
12 application of relevant principals and more on consideration of the expert’s knowledge
13 and experience.¹⁷ McConnell has a sufficient foundation of knowledge and experience
14 to serve as an expert on standards of care in the financial services industry, and his
15 proposed testimony is not obviously wholly unreliable. To find that it is, the court
16 would have to conclude that his review of the evidence was erroneous or incomplete,
17 but questions about the facts supporting an expert’s opinions reflect on credibility, not
18 admissibility. That is, the court cannot decide whether McConnell’s opinions are
19 “right or wrong.”¹⁸ Rather, its task simply is to determine whether McConnell’s
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¹⁷ *Hangarter*, 373 F.3d at 1017.

28 ¹⁸ *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (quoting *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969–70).

1 “testimony has substance such that it would be helpful to a jury.”¹⁹ Here, McConnell’s
2 qualifications are established and not challenged, and it is clear he reviewed the
3 evidentiary record. Therefore, his opinions about the applicable standards of care and
4 how they apply to the situation, which is included in his report to some extent, will be
5 helpful to the jury.
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8 The court cautions, however, that McConnell may not testify solely to
9 construct a factual narrative for the jury.²⁰ He may not simply present some theory of
10 the case favorable to Plaintiffs, particularly one that rests on speculation of malicious
11 motives and forgery. Any testimony that speculates as to motive, intent, or mental
12 state is not appropriate expert testimony and will be subject to objection and exclusion
13 at trial.²¹ Furthermore, for every opinion and conclusion offered about Merrill Lynch’s
14 conduct falling short of industry standards, McConnell must be able to identify and
15 explain the applicable industry standard.
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18 V. CONCLUSION

19 Based on the preceding discussion, Merrill Lynch’s motion to exclude
20 the proposed expert testimony of Chris McConnell at docket 134 is DENIED. The
21 court will not exclude Chris McConnell from testifying under Rule 702 of the Federal
22 Rules of Evidence. Nothing in this order should be deemed a ruling on admissibility
23 of any specific statement contained in the report, and the court reserves the right to
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27 ¹⁹ *Id.*

28 ²⁰ *Johns v. Bayer Corp.*, No. 09-cv-1935, 2013 WL 1498965, at *28 (S.D. Cal. Apr. 10, 2013).

²¹ *See, e.g., Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp.
2d 1069, 1077–78 (D. Oregon 2013).

1 exclude his testimony in the course of trial that exceeds the proper scope of his
2 expertise or is shown to be irrelevant or otherwise inadmissible based on the evidence
3 as presented at trial.
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5 IT IS SO ORDERED this 7th day of September, 2022, at Anchorage,
6 Alaska.
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8 /s/ John W. Sedwick
9 JOHN W. SEDWICK
10 Senior United States District Judge
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